A **BRUNEI REPORT**

Tan Kok Ming Philip v Royal Brunei Airlines Sdn Bhd

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COURT OF APPEAL (BRUNEI) — CIVIL APPEAL NO 3 OF 1993
KUTLU FUAD P, DEREK CONS AND KEMPSTER COMMISSIONERS
2 JUNE 1994

C ***Trusts and Trustees*** *— Constructive trust — Knowingly assisted in breach of trust — Assistance had to be fraudulent or dishonest — Conduct falling short of that does not make a person a constructive trustee*

Royal Brunei Airlines Sdn Bhd ('RBA') entered into a written agreement with Borneo Leisure Travel Sdn Bhd ('BLT') whereby
D BLT undertook to act as a general sales agent for RBA. Philip Tan Kok Ming ('Tan'), the defendant, who was the majority shareholder and the managing director of BLT, signed the agreement on behalf of BLT. There was never any dispute that Tan effectively controlled BLT. For some years, BLT failed to pay RBA sums due under the agreement and an action was brought to recover the money from
E Tan. Tan contended that he was not personally liable to pay any of BLT's debts to RBA.

The Chief Justice found that BLT was the trustee of all moneys received on behalf of RBA and that therefore, Tan was a constructive trustee as he must know or be presumed to have known that money
F had not been paid to RBA. Tan has appealed and RBA has cross-appealed on the ground that the Chief Justice had erred in holding that it had not been established that Tan had either orally or in writing undertaken personally to discharge BLT's liabilities in case of their default (as a guarantor) or that he had undertaken to discharge BLT's liability in any event under an oral or written contract of
G indemnity.

Held, allowing the appeal and dismissing the cross-appeal:

(1) It was not shown that the Chief Justice, in directing himself on the law, had firmly in mind the requirement that Tan's assistance
H was rendered to a fraudulent or dishonest design on the part of BLT, as authorities demand. Conduct which may amount to a breach of trust, however morally reprehensible, will not render a person who had knowingly assisted in the breach of trust liable as a constructive trustee, if that conduct fell short of dishonesty.

I (2) The Chief Justice was right to conclude that there was nothing in writing that could be taken to be a personal guarantee by Tan for his company's debts.

Obiter:

Although an appellate court undoubtedly has jurisdiction to resuscitate a point abandoned at the trial, it will only allow such a course in exceptional circumstances.

Notes

For cases on constructive trusts, see 12 *Mallal's Digest* (4th Ed) paras 910–912.

Cases referred to

Baden & Ors v Societe Generale pour Favoriser le Developpement du Commerce et de l'Industrie en France SA [1992] 4 All ER 161 (folld)

Barnes v Addy (1874) LR 9 Ch App 244 (folld)

Belmont Finance Corp Ltd v Williams Furniture Ltd & Ors [1979] Ch 250; [1979] 1 All ER 118; [1978] 3 WLR 712 (folld)

Ghulam Sarwar & Anor v Nayazali & Ors AIR 1921 Oudh 41 (refd)

Hoong Chin Wah v Cheah Kum Swee & Anor [1967] 1 MLJ 163 (refd)

R v Civil Service Appeal Board, ex p Bruce [1989] 2 All ER 907 (refd)

Legislation referred to

Contracts Act (Cap 106) s 79 [Brunei]

Daljit Singh Sandhu (*Geoffrey Sim* with him) (*Sandhu & Co*) for the appellant.

Bong Ah Loi (*Joseph Hoo Morris & Lal*) for the respondent.

Cur Adv Vult

Kutlu Fuad P (delivering the judgment of the court): This is an appeal by Philip Tan Kok Ming who was the unsuccessful defendant in a suit instituted against him in the High Court by Royal Brunei Airlines Sdn Bhd ('RBA'). The judgment appealed against was given by the Chief Justice, Dato Sir Denys Roberts, on 14 October 1993, when he held that the defendant was liable personally to pay RBA certain debts owed to them by Borneo Leisure Travel Sdn Bhd ('BLT'), the amount to be determined by the Registrar.

As a matter of history (for this appeal concerns liability and not quantum) the Registrar found the amount due to be B$335,160 and on 14 December 1993, final judgment was entered in favour of RBA in that sum against Mr Tan. There is a cross-appeal by RBA.

On 1 April 1986, RBA entered into a written agreement with BLT whereby the latter undertook to act as a general sales agent for RBA in Kota Kinabalu (BLT's head office was there), Kuching, Miri, Bintulu, Sibu, Sandakan, Labuan and Tawau, in accordance with the terms set out in a Schedule. Mr Tan signed the agreement on behalf of BLT as its

managing director. By para 1 of the Schedule, the agreement was stipulated to be subject to the 'rules, reservations, regulations and agreements of the International Air Transport Association'. The resolution relevant to the issues which divide the parties, under the heading 'Moneys due by agent to carriers — remittance', is in these terms:

> 10(b) except as otherwise provided in sub-para (a) of this paragraph, the agent shall collect the amount payable for the transportation or other service sold by it on behalf of the carrier. All moneys collected by the agent for transportation and ancillary services sold under this agreement, including applicable commissions which the agent is entitled to claim thereunder, shall be the property of the carrier and shall be held by the agent in trust for the carrier or on behalf of the carrier until satisfactorily accounted for to the carrier and settlement made. The carrier may, subject to applicable currency regulations, designate the currencies in which remittances are to be made. Unless otherwise instructed by the carrier the agent shall be entitled to deduct from remittances the applicable commission to which it is entitled hereunder.

BLT was formed by Mr Tan in 1986. He has always been its managing director and held 170,000 out of the 200,000 issued shares of the company. There was never any dispute that he effectively controlled BLT.

It was common ground that for some years BLT had failed to pay RBA sums due under the April 1986 agency agreement.

Mr Tan's case all along has been that while this was certainly so, he was not personally liable to pay any of BLT's debts to RBA.

For the reasons that he gave in his reserved judgment, the Chief Justice rejected those parts of RBA's case against Mr Tan which rested on assertions that:

(a) he had orally or in writing guaranteed the payment of the sums due from BLT to RBA;

(b) the corporate veil of BLT should be lifted so that he would be personally liable for BLT's debts; and

(c) he had converted to his own use money which BLT should have paid over to RBA.

In dealing with the submission on behalf of RBA that Mr Tan was a constructive trustee of the moneys received by BLT on the sales of RBA's tickets, the Chief Justice observed that it was not enough for Mr Tan to assert that he left matters to his accountant — he himself had signed annual financial statements of BLT to the effect that he was in control of BLT's financial affairs and he had remained in control of them.

The Chief Justice then set out and referred to para 10(b) of the International Air Transport Association ('IATA') Resolution the effect of which, he said, was to constitute BLT a trustee for such moneys as it might receive on behalf of RBA. The wording employed had this clear intent and the subject matter and objects of the trust were certain. There was thus, he said, an express or declared trust in favour of RBA which meant that BLT

was trustee of all moneys received on behalf of RBA and was obliged to account for it. A

We mention here that although the defendant's petition of appeal stated that the Chief Justice had erred in law and in fact in finding an express or declared trust, perhaps not surprisingly in view of the clear wording of para 10(a) of the IATA Resolution, Mr Sandhu, who appeared on his behalf as he did below, abandoned this ground of appeal. B

To return to the Chief Justice's judgment, on the constructive trustee point, he went on to say:

> The question remains as to whether the fact that BLT is a trustee of RBA money makes Tan, as managing director of BLT, personally liable for the sums covered by the trust. C
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> BLT was, by its contract with RBA, an express trustee. Tan could only be liable as a constructive trustee if he had knowledge that the trust exists, though this knowledge may be imputed to him in this instance.
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> A person who does not actually receive the trust property may incur liability if he knowingly helps in a fraudulent design on the part of the trustee: see *Barnes v Addy* (1874) LR 9 Ch App 244. D
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> This does not mean fraudulent and dishonest in the sense of personal gain. It is sufficient if the stranger assists in the use of trust property in a way which is not permitted by the trust.
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> The required degree of knowledge is that 'of circumstances which would indicate to an honest reasonable man that such a design was being committed, or would put him on enquiry, which the stranger failed to make, whether it was being committed': see *Selangor United Rubber Estates Ltd v Craddock (No 3)* [1968] 2 All ER 173. E
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> Although I have found that this is not a proper case in which to deprive the company of its separate legal personality, so as to make Tan liable for the debts of BLT, I am not left in any doubt that he was the major shareholder, the managing director and the effective controller of the company. F
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> What BLT did, Tan knew about. If he did not know, this was because he had authorized someone else to act, in which event he must be presumed to have known. He knew that there was a contractual obligation to account for and pay over these sums to RBA within a stated period. G
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> He knew, or must be deemed to have known, that money had not been paid to RBA as it should have been. When asked what had happened to this money, he replied that he did not know.
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> It must be assumed that he either took it for himself, which was not shown, or that he authorized its use in the BLT business, to meet salaries, expenses and other overheads. As a 'reasonable man', he was on enquiry as to what happened to the RBA money. H
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> I think that he assisted BLT to make 'fraudulent' use, for improper purposes, of trust moneys held by BLT on behalf of RBA. This makes him liable, as a constructive trustee, for the debts which BLT owes to RBA. I

It is not necessary to refer to many authorities regarding the elements which need to be established if a person is to be held liable as a constructive trustee on the grounds of 'knowing assistance' because counsel on both

A sides in this appeal have agreed on the state of the law. Any examination of authority must begin with *Barnes v Addy* (1874) LR 9 Ch App 244 and the formulation of Lord Selborne LC at pp 251–252:

> Now in this case we have to deal with certain persons who are trustees, and with certain other persons who are not trustees. That is a distinction to be
> B borne in mind throughout the case. Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees de son tort, or actually participating in any fraudulent conduct of the trustee to the injury of the cestui que trust.
> C But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees. Those are the principles,
> D as it seems to me, which we must bear in mind in dealing with the facts of this case. If those principles were disregarded, I know not how anyone could, in transactions admitting of doubt as to the view which a Court of Equity might take of them, safely discharge the office of solicitor, of banker, or of agent of any sort to trustees. But, on the other hand, if persons dealing honestly as agents are at liberty to rely on the legal power of the trustees,
> E and are not to have the character of trustees constructively imposed upon them, then the transactions of mankind can safely be carried through; and I apprehend those who create trusts do expressly intend, in the absence of fraud and dishonesty, to exonerate such agents of all classes from the responsibilities which are expressly incumbent, by reason of the fiduciary relation, upon the trustees.

F In *Belmont Finance Corp Ltd v Williams Furniture Ltd & Anor* [1979] Ch 250; [1979] 1 All ER 118; [1978] 3 WLR 712, a submission to the English Court of Appeal that it was not necessary to establish that the breach of trust in respect of which it was sought to impose liability on the defendant as a constructive trustee was fraudulent or dishonest, was emphatically
G rejected. Buckley LJ said this ([1979] Ch 250 at p 267; [1979] 1 All ER 118 at p 130; [1978] 3 WLR 712 at p 728:

> I think two questions need to be considered: first, is it necessary when a person is sought to be charged as a constructive trustee that the design of which he is alleged to have had knowledge should be a fraudulent and
> H dishonest design? For this purpose I do not myself see that any distinction is to be drawn between the words 'fraudulent' and 'dishonest'; I think they mean the same thing, and to use the two of them together does not add to the extent of dishonesty required.
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> The second question is: if this is necessary, does the statement of claim here allege dishonesty with sufficient particularity? The plaintiff company
> I has contended that in every case the court should consider whether the conduct in question was so unsatisfactory — whether it can be strictly described as fraudulent or dishonest in law — as to make accountability on the footing of constructive trust equitably just. This, as I have said, is admitted to constitute an extension of the rule as formulated by

> Lord Selborne LC. That formulation has stood for more than 100 years. To depart from it now would, I think, introduce an undesirable degree of uncertainty to the law, because if dishonesty is not to be the criterion, what degree of unethical conduct is to be sufficient? I think we should adhere to the formula used by Lord Selborne LC. So in my judgment the design must be shown to be a dishonest one — that is to say, a fraudulent one.

Orr LJ agreed with this view of the law, as did Goff LJ (as he then was) who said ([1979] Ch 250 at p 274; [1979] 1 All ER 118 at p 135; [1978] 3 WLR 712 at p 734):

> If and so far as Ungoed-Thomas J [in *Selangor United Rubber Estates Ltd v Craddock (No 3)* [1968] 1 WLR 1555; [1968] 2 All ER 1073] intended, as I think he did, to say that it is not necessary that the breach of trust in respect of which it is sought to make the defendant liable as a constructive trustee should be fraudulent or dishonest, I respectfully cannot accept that view. I agree that it would be dangerous and wrong to depart from the safe path of the principle as stated by Lord Selborne LC to the uncharted sea of something not innocent (and Mr Miller conceded that mere innocence would not do) but still short of dishonesty. In my judgment, therefore, it was necessary in this case to plead, and of course in due course to prove that the breach of trust by the directors was dishonest.

There is a valuable review of the relevant authorities in the judgment of Peter Gibson J in *Baden v Societe General Pour Favoriser le Developpement du Commerce et de L'industrie en France SA* [1992] 4 All ER 161 and counsel accept his formulation of the four elements that have to be established on the issue we are discussing:

(1) the existence of a trust;

(2) the existence of a dishonest and fraudulent design on the part of the trustee of the trust;

(3) the assistance of a stranger in that design; and

(4) the knowledge of the stranger.

Peter Gibson J went on to say, at pp 232–233:

> I would add that whilst it is of course helpful to isolate the relevant constituent elements of the 'knowing assistance' category in this way, it is important not to lose sight of the requirement that, taken together, those elements must leave the court satisfied that the alleged constructive trustee was a party or privy to dishonesty on the part of the trustee.

The issues on this appeal were narrowed when Mr Sandhu conceded that a trust had been created and that there was a breach of trust by BLT in which Mr Tan could be said to have assisted with actual knowledge. As the appeal developed, all that he disputed was that a dishonest or fraudulent design on the part of BLT had been properly pleaded or established.

It will have been seen that, in the passage quoted above from his judgment, the Chief Justice correctly summarized Lord Selborne's formulation in *Barnes v Addy* (1874) LR 9 Ch App 244 by referring to the requirement that the person held liable as a constructive trustee must be shown knowingly to have helped in a fraudulent design, but he went on to

say that this 'did not mean fraudulent and dishonest in the sense of personal gain'. It was 'sufficient if the stranger assists in the use of trust property in a way which is not permitted by the trust'.

When the judgment is read as a whole, including the summary contained in para (d) of the conclusions at the end of the judgment ('Tan assisted BLT in its breach of trust by allowing RBA moneys, held on trust by BLT, not to be paid to RBA as the latter's contract with BLT requires') it seems to us, with great respect, that it has not been shown that the Chief Justice, in directing himself on the law, had firmly in mind the requirement that Mr Tan's assistance was rendered to a fraudulent or dishonest design on the part of BLT, as the authorities demand. It is relevant to note that where the judgment dealt with the allegation of conversion, the Chief Justice indicated that he had found nothing improper in the way the money in the BLT account had been handled; transactions upon which Mr Bong for RBA so heavily relied for his submission to us that a dishonest or fraudulent design on the part of BLT had indeed been established.

It was not part of Mr Bong's submissions that it was enough simply to show that there had been a breach of trust on the part of BLT, in which Mr Tan had assisted. He sought to persuade us that if the submission that there had been a misdirection could be sustained, an examination of the evidence led at the trial would show that BLT, through the medium of its governing director, had acted fraudulently or dishonestly.

The task of the Chief Justice was rendered the more difficult because the allegations relating to fraudulent or dishonest design by the trustees (BLT) and to the nature of the assistance given by Mr Tan in furthering that design were not pleaded in the amended statement of claim with the clarity and particularity required by the rules of court as explained and constantly emphasized by the courts. Nor did those representing Mr Tan apply for particulars to which they would undoubtedly have been entitled. Had the proper procedure been followed, the Chief Justice would have known the precise nature and parameters of the fraudulent or dishonest design to which it was claimed Mr Tan lent his aid; and would have addressed the specific allegations made.

The evidence showed (and there was no dispute about this) that between August 1987 and May 1988, acting on a standing instruction from Mr Tan, BLT's bank placed a total of B$770,000 on fixed deposit in BLT's name. From those deposits, during August 1988, a total of B$226,573 was transferred into a fixed deposit account in the name of Mr Tan. Between November 1987 and September 1991, a total of B$185,000 was taken from BLT's current account and also placed in Mr Tan's own fixed deposit account. According to the accounts, all these funds, together with the interest earned, eventually found their way back into BLT's ordinary account. Mr Tan explained in his evidence that these arrangements had been made partly so that interest would be earned and partly for security reasons — he did not want his employees to be in a position to deal with large sums of money belonging to BLT.

Mr Bong has submitted that the manner in which BLT's accounts were handled indicated dishonesty or fraud — as we understand his submission. This was because the money on deposit was tied up and not available to pay RBA (and other creditors) what was due to them. The Chief Justice found Mr Tan's reasons for the way the money was dealt with, 'perfectly proper'. In our judgment, so far as the creditors of BLT were concerned, their loss was due to the fact that money owed to them was not paid, and not to the nature of the accounts kept by BLT. In our view, dishonest or fraudulent conduct on the part of BLT was not established by this evidence.

As evidence which would support a finding of dishonesty, Mr Bong also relied on what happened to seven cheques drawn on BLT's account in favour of RBA. According to the testimony of Mr Chua who manages RBA's financial affairs, it was their practice to send cheques drawn in their favour to BLT in Kota Kinabalu so that they could be paid into RBA's bank account there. This was because RBA had no office in Kota Kinabalu. Mr Chua was told by BLT's Sabah office manager that the cheques had not been banked in because there were insufficient funds to meet them. When Mr Tan was told this, he issued seven new cheques. But these were not paid into RBA's account, once again, it seems due to lack of funds to meet them.

Due, no doubt, to the defective pleadings with deficient particulars, it seems that the Chief Justice did not understand counsel for RBA to be maintaining that the way these cheques were dealt with advanced RBA's case against Mr Tan for he does not mention them in this context in his judgment. Nor does it appear that this matter was relied upon by counsel in his closing address to the court. We are unable to find evidence of dishonesty or fraud in what BLT did — it seems to us that all that happened in relation to the cheques was part and parcel of BLT's inability to meet its financial obligations.

Mr Bong's final submission on this aspect of the case was based on what Mr Tan is recorded to have said at a meeting (on 18 November 1988), with RBA officials called to discuss BLT's delay in submitting returns with the moneys due to RBA. The relevant part of the minutes reads:

> 4 It was explained that all sales return (sic) from travel agents and GSAs are submitted to BKI and then to BWN. Borneo Leisure added mail service played a role in the delay. Difficulty in collection is another problem.

Mr Bong argued that mail delays had played no part in BLT's failure to pay, and for BLT to pretend (through Mr Tan) that they had was an attempt to mislead RBA and was evidence of dishonesty or fraud.

Again there is no indication, either in the pleadings or in the submissions of counsel at the trial that reliance was being placed on anything said by Mr Tan about delays at the November 1983 meeting — and, not surprisingly, no mention of this is made in the judgment. We cannot accept that this matter takes RBA's case any further.

A As mentioned earlier, Mr Sandhu has conceded, for the purposes of this suit, that BLT was in breach of trust. However, it has never been suggested by counsel for RBA that BLT, in order to meet its obligations under the agreement with RBA, should have kept the proceeds of the sale of RBA's tickets, etc, in a separate account and not used any of these moneys in the ordinary conduct of their business. This would have been B unrealistic particularly in view of the fact that BLT was the ticketing agent as well for a number of other airlines.

The evidence revealed a sorry tale of mismanagement and broken promises; RBA have lost their money as a result, but in our judgment it was not established that BLT was guilty of fraud or dishonesty in relation C to the amounts it held in trust for RBA. As long-standing and high authority shows, conduct which may amount to a breach of trust, however morally reprehensible, will not render a person who has knowingly assisted in the breach of trust liable as a construtive trustee, if that conduct falls short of dishonesty.

D We now turn to RBA's cross-appeal. It was contended that the Chief Justice erred in holding that it had not been established that Mr Tan had either orally or in writing undertaken personally to discharge BLT's liabilities in case of their default (as a guarantor) or that he had undertaken to discharge BLT's liability in any event under an oral or written contract of indemnity.

E In his judgment, the Chief Justice discussed the writing relied upon by RBA for this part of the case. In a letter by Mr Tan to RBA dated 11 June 1991, he wrote:

> Once again, I wish to assure you that I will be (sic) personally ensure that all outstanding debt owed by Borneo Leisure Sdn Bhd will be settled.
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> F As to the fine points of law in respect of the deed of guarantee and indemnity, I shall revert back to you once I consult my legal adviser by Monday 17 June 1991.

We mention here that in the event, Mr Tan never signed the document which had been presented to him.

G Just over one year later, on 13 June 1992, Mr Tan wrote a letter to RBA which contained proposals 'to resolve the problem between our two companies'. He suggested that the debt to RBA 'should be considered as RM300,000' and asked RBA to accept his proposal, inter alia, that 'BLT will settle B$150,000 by the end of the year, after it has finalized sales to H the new owners'. (The letter had spoken of Mr Tan's negotiations with 'investors or buyers' for his company.) There is a reference to the offer to settle the outstanding amount for the reduced sum of B$300,000 in a letter dated 18 July 1992, written after Mr Tan had received no reply to his June letter.

I In our respectful judgment, the Chief Justice was right to conclude that there was nothing in writing that could be taken to be a personal guarantee by Mr Tan.

Section 79 of the Contracts Act (Cap 106) expressly provides that a guarantee may be either oral or written. The evidence relied upon by RBA

to support this part of its claim is fully reviewed by the Chief Justice in his judgment and we do not think it necessary to rehearse it again here. The Chief Justice correctly directed himself on the point when he said:

> In this case, the debts were owed by the company, BLT, to RBA, and to a number of airlines and other creditors as well. These debts could only be chargeable to a director of the company if it can be shown, in the clearest terms, that he has undertaken, in a personal capacity, to pay the outstanding debts of the company.
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> It is not enough to show that the managing director has promised to raise the money to pay the debts, or to do his best to pay, or to do all he can to ensure that the company pays. There must be a clear assumption, written or oral, of the debt of another, if the latter does not pay.

His conclusion that Mr Tan had not been shown to have given a personal undertaking to be responsible for his company's debts is, we think, unassailable.

Finally, Mr Bong sought to argue before us that, on the evidence, the present was a case where the court would be justified in lifting the corporate veil so that the principle that the company is an independent legal entity could be disregarded.

The difficulty in Mr Bong's way was that the record of the submissions made on behalf of RBA at the trial, and the judgment, show that that part of RBA's case which depended on 'lifting the veil' was expressly abandoned by Mr Raymond Lam who appeared for RBA with Mr Bong at the trial, and who conducted the case throughout before the Chief Justice (Mr Bong appeared alone before us).

There is clear authority for the proposition that although an appellate court undoubtedly has jurisdiction to resuscitate a point abandoned at the trial, it will only allow such a course in exceptional circumstances: see *R v Civil Service Appeal Board, ex p Bruce* [1989] 2 All ER 907 and *Hoong Chin Wah v Cheah Kum Swee & Anor* [1967] 1 MLJ 163. In the latter case, Azmi CJ, giving the judgment of the Federal Court of Malaysia cited and applied a decision of the Privy Council in a case from India — *Ghulam Sarwar & Anor v Nayazali & Ors* AIR 1921 Oudh 41, where their Lordships stressed the need for 'exceptional circumstances'. Here, it is apparent that the abandonment was the result of a deliberate decision by counsel who was conducting the plaintiffs' case. There is no suggestion that there was any mistake or misunderstanding by counsel or the trial judge. It was for these reasons that during the hearing of the appeal we decided that, in accordance with settled authority, it would not be a proper exercise of discretion, having regard to all the circumstances, if we were to allow the issue to be argued.

For these reasons, the appeal is allowed. We set aside the judgment of the Chief Justice dated 14 October 1993. The cross-appeal is dismissed.

Appeal allowed and cross-appeal dismissed.

Reported by Jeanne Tan